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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1573**

Maria M. Schimming,
Appellant,

vs.

Equity Services of St. Paul, Inc.,
Respondent.

**Filed April 23, 2012
Affirmed
Hudson, Judge**

Ramsey County District Court
File No. 62-CV-09-13339

Maria Schimming, Eagan, Minnesota (pro se appellant)

Kirsten J. Libby, Jon E. Paulson, Libby Law Office, P.A., St. Paul, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Halbrooks, Judge; and Collins, Judge.*

UNPUBLISHED OPINION

HUDSON, Judge

Appellant challenges the district court's summary judgment in favor of respondent on appellant's claims of unlawful termination, invasion of privacy, negligent infliction of

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

emotional distress, intentional infliction of emotional distress, and defamation. Because there are no genuine issues of material fact and summary judgment is appropriate as a matter of law, we affirm.

FACTS

Pro se appellant Maria Schimming worked as a home health-care nurse for respondent from 2005 to 2008. Respondent reimbursed its employees for payments to a health-insurance provider. Appellant applied to Blue Cross-Blue Shield of Minnesota (Blue Cross) for health insurance. In July 2008, Blue Cross cashed a check from appellant but subsequently denied her insurance application. Ultimately, Blue Cross approved appellant's application in December 2008. On six occasions in 2008 before Blue Cross approved the application, respondent reimbursed appellant \$505. Respondent contacted Blue Cross to determine if appellant was insured. After determining appellant had not been insured when receiving the reimbursements, respondent discharged appellant.

In December 2009, appellant sued respondent pleading claims for unlawful termination, invasion of privacy, negligent infliction of emotional distress, intentional infliction of emotional distress, and defamation. Respondent asserted counterclaims of conversion and fraud and later moved for summary judgment on all claims. The district court granted summary judgment as to appellant's claims but denied summary judgment as to respondent's counterclaims. Pursuant to Minn. R. Civ. P. 68, respondent offered to dismiss its counterclaims with prejudice in return for appellant dismissing her claims against respondent with prejudice. Appellant declined the offer. After a two-day trial,

the jury found that appellant's conduct resulted in conversion of respondent's property, assessing damages of \$833.17, but that she did not commit fraudulent misrepresentation. The district court concluded that, pursuant to rule 68, respondent was entitled to costs and disbursements.

Appellant filed a notice of appeal on September 6, 2011, simultaneously with her brief, which commenced respondent's 30-day briefing period. *See* Minn. R. Civ. App. P. 131.01, subd. 2 (stating that respondent's brief is due within 30 days after service of appellant's brief). However, appellant failed to order a transcript as required by Minn. R. Civ. App. P. 110.02. Appellant moved for additional time to order the transcript; that motion was denied on the basis that allowing appellant to order a transcript at a late stage in the appeal process would prejudice respondent. This appeal follows.

D E C I S I O N

A party seeking review of a district court's decision must provide a transcript as part of the record on review. Minn. R. Civ. App. P. 110.02. Failure to order a transcript may result in dismissal, or the court may conduct a review of the appeal that is limited to whether the district court's conclusions of law are supported by the findings of fact. *Duluth Herald & News Tribune v. Plymouth Optical Co.*, 286 Minn. 495, 498, 176 N.W.2d 552, 555 (1970). Dismissal is appropriate if, absent the transcript, the record is inadequate. *Noltimier v. Noltimier*, 280 Minn. 28, 29, 157 N.W.2d 530, 531 (1968).

Here, appellant challenges only the district court's grant of summary judgment, which we may review without a trial transcript.¹

In her lawsuit against respondent, appellant claimed unlawful termination, invasion of privacy, negligent infliction of emotional distress, intentional infliction of emotional distress, and defamation. Appellant challenges the district court's summary judgment in favor of respondent on her claims, but her arguments are often unclear. Appellant recites caselaw but provides little, if any, analysis and does not argue in what way the district court may have erred. Therefore, appellant arguably has waived her arguments on appeal because her briefing is inadequate. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519–20, 187 N.W.2d 133, 135 (1971) (determining that “assignment of error based on mere assertion and not supported by any argument or authorities in appellant’s brief is waived,” unless prejudicial error is obvious). In the interests of justice, however, we will address appellant’s claims. *See Minn. R. Civ. App. P. 103.04* (noting that appellate courts may address issues as justice requires).

Summary judgment allows a court to dispose of a claim on the merits “if there is no genuine dispute regarding the material facts, and a party is entitled to judgment under the law applicable to such facts.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). “[T]he reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). “We review de novo whether a genuine issue of material fact exists” and

¹ The record includes the transcript of the summary-judgment hearing.

“whether the district court erred in its application of the law.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). We ask in reviewing summary judgment whether: (1) genuine issues of material fact exist and (2) the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

Unlawful termination

Appellant argues that the district court erred in granting summary judgment on her unlawful-termination claim because the jury found that appellant did not commit fraud. The district court concluded that, because Minnesota is an at-will state and no employment contract existed, appellant’s unlawful-termination claim failed. “In the absence of an express or implied agreement to the contrary, . . . Minnesota law presumes that employment for an indefinite duration is at will.” *Kvidera v. Rotation Eng’g & Mfg. Co.*, 705 N.W.2d 416, 420 (Minn. App. 2005) (quotation omitted). But a presumption of at-will employment may be overcome if an employee engages in conduct protected by statute. *Kratzer v. Welsh Cos., LLC*, 771 N.W.2d 14, 18–19 (Minn. 2009) (noting that whistleblower statute makes it illegal for employer to terminate employee for reporting to employer a violation of federal or state law).

Here, no employment contract existed, and appellant did not assert that she was discharged for statutorily protected behavior. In addition, the employer’s insurance-reimbursement plan stated that “[t]his plan shall not be deemed to constitute an employment contract.” Because appellant failed to provide any evidence showing that she was not an at-will employee, the district court did not err in granting summary judgment to respondent on appellant’s unlawful-termination claim. *See Lubbers v.*

Anderson, 539 N.W.2d 398, 401 (Minn. 1995) (“A defendant is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the plaintiff’s claim.”).

Invasion of privacy

Appellant argues that the district court erred by granting summary judgment to respondent on her invasion-of-privacy claim because “respondent violated the law by invading [her] privacy without consent” when it obtained information from Blue Cross regarding her lack of insurance. The district court concluded that private information does not include information regarding whether a person has insurance coverage and, therefore, respondent did not violate appellant’s privacy by contacting Blue Cross to inquire about appellant’s insurance coverage. Minn. Stat. § 72A.502, subd. 2 (2010), authorizes accessing privileged or personal information in connection with insurance transactions if that information “is reasonably necessary to detect or prevent criminal activity [or] fraud.” *Blue Cross & Blue Shield of Minn. v. Larson*, 472 N.W.2d 885, 886 (Minn. App. 1991) (citing Minn. Stat. § 72A.502, subd. 2 (1990)) (determining legislature specifically authorized disclosure of personal or privileged information in cases involving insurance fraud), *review denied* (Minn. Sept. 17, 1991).

Here, appellant indicated to respondent that she was insured by Blue Cross, and therefore respondent was authorized under Minn. Stat. § 72A.502 to obtain from Blue Cross information that appellant was not insured. In doing so, respondent did not violate appellant’s privacy. Therefore, the district court did not err as a matter of law by granting summary judgment on appellant’s invasion-of-privacy claim.

Negligent infliction of emotional distress

Appellant argues that the district court erred in granting respondent summary judgment on her negligent-infliction-of-emotional-distress claim. Appellant argues that she suffered emotional distress caused by respondent's "extreme, outrageous, and reckless" conduct that "passes the boundaries of decency and is utterly intolerable to the civilized community." A negligent-infliction-of-emotional-distress claim succeeds "when that plaintiff is within a zone of danger of physical impact, reasonably fears for his or her own safety, and consequently suffers severe emotional distress with resultant physical injury." *Bohdan v. Alltool Mfg., Co.*, 411 N.W.2d 902, 907 (Minn. App. 1987), *review denied* (Minn. Nov. 13, 1987). "An exception to the 'zone-of-danger' rule is that a plaintiff may recover damages for mental anguish or suffering for a direct invasion of his rights, such as defamation, malicious prosecution, or other willful, wanton or malicious conduct." *Id.* But whether pleading the zone of danger or its exception, plaintiff must show physical manifestations of the distress to prove "the genuineness and gravity of the emotional suffering." *Soucek v. Banham*, 503 N.W.2d 153, 164 (Minn. App. 1993) (quotation omitted).

It is undisputed that appellant alleged no physical injuries. Therefore, appellant cannot demonstrate severe emotional distress, and the district court did not err in granting respondent summary judgment on appellant's negligent-infliction-of-emotional-distress claim.

Intentional infliction of emotional distress

Appellant appears to apply the same argument that she asserted for her negligent-infliction-of-emotional-distress claim to her intentional-infliction-of-emotional-distress claim: that she suffered emotional distress caused by respondent's "extreme, outrageous, and reckless" conduct that "passes the boundaries of decency and is utterly intolerable to the civilized community." To recover for intentional infliction of emotional distress, a plaintiff must show: (1) that the conduct is extreme and outrageous, (2) that it is intentional or reckless, (3) that it causes emotional distress, and (4) that the distress is severe. *Hubbard v. United Press Int'l*, 330 N.W.2d 428, 438–39 (Minn. 1983). Summary judgment on an intentional-infliction-of-emotional-distress claim is granted "if a party does not meet the high standard of proof needed" to establish emotional distress. *Kuelbs v. Williams*, 609 N.W.2d 10, 17 (Minn. App. 2000), *review denied* (Minn. June 27, 2000).

The district court concluded that appellant had not satisfied the elements of an intentional-infliction-of-emotional-distress claim because, among other reasons, she failed to demonstrate severe mental distress. The district court found that appellant's complaint contained conclusory statements that offered nothing more than evidence of therapy, depression, anxiety, and financial difficulties typical for a person who recently lost her job. We agree that these averments do not satisfy the heavy burden of demonstrating severe emotional distress, and therefore appellant's intentional-infliction-of-emotional-distress claim was insufficient to withstand a summary judgment motion.

Defamation

Appellant argues that the district court erred by dismissing her defamation claim because respondent's employee stated in the presence of others that appellant stole money from respondent when the employee's statement was "proven . . . false per judge's order."² To establish defamation, a plaintiff must prove that a statement: (1) was false, (2) was communicated to someone else, and (3) tended to harm the plaintiff's reputation. *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 25 (Minn. 1996).

Because appellant disputed the truth of respondent employee's statement, the district court accepted for purposes of summary judgment that the statement was false. But a statement, even if defamatory, is qualifiedly privileged if it is made upon a proper occasion, from a proper motive, and based on reasonable or probable cause. *McBride v. Sears, Roebuck & Co.*, 306 Minn. 93, 96, 235 N.W.2d 371, 374 (1975). To defeat qualified privilege, a plaintiff must prove actual malice, which is "ill-will and improper motive or wishing wantonly and without cause to injure the plaintiff." *Bauer v. State*, 511 N.W.2d 447, 449 (Minn. 1994). We agree with the district court that respondent's statement was qualifiedly privileged and that appellant did not present evidence sufficient to overcome the qualified privilege. Appellant provided no evidence of ill will or wanton conduct on the part of respondent, and therefore summary judgment was appropriate on the defamation claim.

² Appellant uses the term "slander" throughout her brief. However, caselaw generally uses the broader category of defamation. "Oral defamation is slander; written defamation is libel." *Black's Law Dictionary* 480 (9th ed. 2009) (quotation omitted).

Appellant also argues that the district court erred in dismissing the defamation claim because she must show prospective employers the discharge letter from respondent, which states that appellant was terminated for knowingly committing insurance fraud. Appellant asserts that she must reveal the letter because potential future employers require a reason for her discharge, and respondent knew appellant would be compelled to provide the letter to prospective employers.

The district court ruled on appellant's "forced self-slander" claim separately. But because it represents a theory of defamation, we include it as part of appellant's defamation claim. As the district court recognized, it appears that appellant's "forced self-slander" claim may have been intended to be a claim for compelled self publication. Typically, when a defendant communicates a statement to a plaintiff, who communicates the statement to a third party, publication of the statement does not occur. *Keuchle v. Life's Companion P.C.A., Inc.*, 653 N.W.2d 214, 219 (Minn. App. 2002). But publication occurs if "the plaintiff is compelled to publish the defamatory statement to a third person and if it was foreseeable to the defendant that the plaintiff would be so compelled." *Id.* In any event, as with appellant's general defamation claim, the record does not establish that when respondent provided the reason for appellant's discharge, it was done with malice. *See Michaelson v. Minn. Mining & Mfg. Co.*, 474 N.W.2d 174, 181 (Minn. App. 1991) (stating that the law does not imply malice from a communication, and actual malice must be proved), *aff'd*, 479 N.W.2d 58 (Minn. 1992) (quotation omitted). We conclude that summary judgment was appropriate.

Finally, appellant alleged, although not in her formal pleadings, that respondent did not pay her salary and vacation pay owed within the required time frame. Appellant also makes this argument on appeal. As the district court noted, if a discharged employee was entrusted with money or property while employed, the employer has ten working days to adjust the person's owed wages. Minn. Stat. § 181.14, subd. 4 (2010). Appellant was entrusted with keys and medications that she asserts she returned to respondent after she was discharged. However, respondent argues that appellant also was entrusted with respondent's property in the form of a personal loan made to appellant, in addition to the unpaid insurance-reimbursement payments. The district court found that it was undisputed that respondent provided the required accounting within the ten-day period. On appeal, appellant disputes that respondent provided this accounting, but she has provided no evidence to support this assertion. In addition, accrued vacation is an earned right to paid time off, not payment when discharged, unless an employment contract states otherwise. *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 126 (Minn. 2007). Appellant provides no evidence of an employment contract allowing for payment of vacation time upon discharge.

Affirmed.